AMENDED IN ASSEMBLY AUGUST 23, 2004

AMENDED IN SENATE APRIL 12, 2004

SENATE BILL No. 1146

Introduced by Senator Dunn
(Coauthor: Assembly Member Dutra)

January 22, 2004

~~An act to amend Section 798.25 of the Civil Code, relating to mobilehome parks.~~ *An act to add Title 8 (commencing with Section 945.6) to Part 2 of Division 2 of the Civil Code, relating to construction defects.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1146, as amended, Dunn. ~~Mobilehome park rules: amendments~~ *Construction defects: cooperative defense agreements.*

Existing law sets forth the defects in residential construction that are actionable and the procedures necessary to bringing an action against a builder or other persons for a defect in residential construction.

This bill would require a builder against whom a construction defect claim has been received to offer all other potentially responsible parties a cooperative defense agreement. The bill would specify the required contents and effect of that agreement, as specified. The bill would establish the procedures for potentially responsible parties to enter into the agreement, reject the agreement, or demand binding arbitration, as specified. Under specified circumstances, the agreement shall supersede any prior agreement for the payment of defense costs or liability in the action which a prior agreement would be declared void as against public policy and unenforceable. The bill would further require a builder to propose a reallocation of defense costs among the

participants to the agreement, which would be subject to objection and a demand for binding arbitration, as specified.

~~Existing law provides that when the management of a mobilehome park proposes an amendment to the park's rules and regulations, the management must meet and consult with the homeowners in the park, their representatives, or both, after providing written notice to all of the homeowners 10 days or more before the meeting.~~

~~This bill would create an exception from that requirement if the proposed amendment is mandated by a change in the law, as specified.~~

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

~~SECTION 1. Section 798.25 of the Civil Code is amended to~~

SECTION 1. The Legislature hereby finds and declares, as follows:

(a) Over the past two decades trade contractors, material suppliers, and their insurers have been required to indemnify and pay for damages and defense costs far outside their scope of work and beyond their comparative fault. The Legislature finds that these circumstances have had the direct effect of (1) insurers refusing to provide general liability coverage to many trade contractors and material suppliers, forcing them out of business and (2) significantly increasing insurance premiums resulting in higher housing costs and preventing many working Californians from purchasing homes. It is therefore the intent of the Legislature to provide a fair and equitable allocation of fault among parties who desire to cooperate in jointly funding the defense of an action alleging deficiencies in residential housing.

(b) In order to fulfill its intent to provide a more equitable allocation of fault among builders, trade contractors, and material suppliers, as well as to provide more affordable housing, the Legislature intends to promote the use of cooperative defense agreements (CDAs) in order to lower the total cost to defendants, cross-defendants, and their insurers resulting from a construction defect action. The primary objectives of a CDA are to do all of the following:

(1) To establish a mechanism for the joint funding of defense to a complaint alleging construction defects through a fair and

equitable allocation of responsibility based upon the comparative fault of each potentially responsible party.

(2) To encourage joint cooperation to identify whether deficiencies exist and to formulate a reasonable scope and method of repair so as to facilitate a prompt and equitable resolution of action.

(3) To establish procedures for resolving issues and minimizing unnecessary controversy among the parties concerning allocation of defense costs and indemnity. This approach is intended to avoid litigation and to reduce litigation costs by reducing duplication of counsel, experts, and investigation attendant to protracted construction litigation.

SEC. 2. Title 8 (commencing with Section 945.6) is added to Part 2 of Division 2 of the Civil Code, to read:

TITLE 8. EQUITABLE FAULT ALLOCATION IN CONSTRUCTION DEFECT CASES

945.6. A cooperative defense agreement (CDA) is an agreement entered into by a builder, as defined in Section 911, and various other potentially responsible parties (PRPs) to cooperate in jointly funding the builder's defense of an action, in the form of either a civil lawsuit or arbitration proceeding in which the claimant seeks damages for alleged construction defects arising out of a contract for residential construction subject to Title 7 (commencing with Section 895) (hereafter the action).

945.7. For purposes of this title, a PRP is the builder and every other contractor, subcontractor, tradesman, design professional, individual product manufacturer, or material supplier involved in the respective construction project, and obligated by contract or statute to defend the builder, but does not include a party that is not obligated by contract or statute to defend the action against the builder.

945.8. This title shall apply to any action filed on or after January 1, 2005.

945.9. Nothing in this title shall relieve a party from complying with Title 6 (commencing with Section 420) and Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure, Title 2 (commencing with Rule 200) of the California Rules of Court, or any local rule governing the filing of a

complaint, cross-complaint, or demand for arbitration, and responses to the same.

945.10. At the time of its tender of a defense to an action, the builder shall offer a reasonable and equitable CDA to every PRP from whom the builder seeks a defense or indemnification, or both. The builder's failure to offer a CDA to a party shall be an absolute defense to an action by the builder against that party to enforce a contractual provision seeking a defense, indemnity, or contribution in excess of that party's comparative fault. With respect to any PRPs that fail to comply with a CDA, all statutes of limitation otherwise applicable to claims against that PRP shall be tolled from the date the builder offers a CDA to the PRP to the date of the arbitrator's service of a statement of decision pursuant to Section 945.21 or the dismissal of the action, whichever is later.

945.11. The proposed CDA shall include, but need not be limited to, all of the following provisions:

(a) The name and last known address of all PRPs.

(b) An initial allocation, based on principles of comparative fault, between the builder and the other PRPs to whom the builder offers the CDA, of the costs of the defense of the action incurred after the builder offers the CDA.

(c) The identity, background, experience, fees, and costs of the builder's defense counsel, and a procedure for that counsel's submission of invoices to the PRPs.

(d) The identity, background, and experience, and fees of the builder's experts, and a procedure for the expert's submission of invoices and payment of the same.

(e) A stipulation that the fees and costs charged by the builder's counsel and experts shall be consistent with billing guidelines established by the builder's insurance carrier. All these fees and costs shall be deemed part of the defense costs for which the participants to the CDA are liable on the basis of the initial allocation of defense costs.

(f) The builder's agreement to regularly provide all parties to the CDA copies of its defense counsel's and expert's itemized bills subject to allocation, with a breakdown of amount owed by each party according to the initial allocation of defense costs.

945.12. The PRPs shall have 120 days from the date the builder offers the CDA to enter into the CDA, reject the CDA, or demand binding arbitration solely for the purpose of establishing

that the PRP has no liability and therefore no duty to defend, that the terms of the CDA are inequitable given the facts known to the parties at the time, or that the fees of the builder's counsel or its experts are unreasonable. The PRPs shall serve their responses to the proposed CDA on the builder and all other PRPs. Any expenses incurred by a PRP in response to a CDA shall not be considered voluntary under the terms of the PRP's insurance policies.

945.13. On the motion of any PRP, the arbitrator shall serve notice of, and conduct, a pre-allocation conference with all PRPs for the purpose of determining the appropriateness of the terms of the proposed CDA, including, but not limited to, the initial defense allocation. Counsel for the claimant PRP shall attend the conference for the sole purpose of disclosing all material facts then known to the claimants regarding their claims. These proceedings shall be treated as privileged settlement discussions pursuant to Chapter 2 (commencing with Section 1115) of Division 9 of, and Section 1152 of, the Evidence Code. Statements made or documents shared during these proceedings shall be inadmissible as evidence in any legal proceeding. The arbitrator's fees, and any other costs of this arbitration proceeding, shall be a component of the defense costs governed by this chapter. However, the arbitrator shall have the authority to order a party to pay all or a portion of the related fees and costs if the arbitrator determines that, based on the facts and circumstances of the case, a reasonable person would not have asserted the position taken by the claimant.

945.14. During the time set forth in Section 945.13, the PRPs shall be entitled to engage in noninvasive inspections of the subject properties for the purpose of assisting the parties in reaching an initial allocation of defense costs. The PRP requesting these inspections shall give the builder notice of this request, and the builder shall exercise its best efforts to put all other PRPs on reasonable notice of the inspections. The inspections shall be conducted in a reasonable manner and in such a way as to avoid duplicative inspections later in the action, and shall be incorporated into any pending court discovery orders. All inspections shall be coordinated and scheduled through the claimants' counsel and, if claimants have legal representation, there shall be no direct communication with claimants at the inspections. Nothing in this section is intended to alter the rights

and obligations of the parties as set forth in Title 3 (commencing with Section 367) of Part 2 of the Code of Civil Procedure.

945.15. The builder shall be entitled to offer the CDA to additional PRPs as the action progresses based on information giving rise to a good faith belief that an additional PRP is liable for a portion of plaintiffs' alleged damages. In that event, the builder shall simultaneously propose a revised allocation of defense costs, and all PRPs shall have the right to object as set forth in Section 945.12. However, no PRP may raise an objection that has been adjudicated in a prior arbitration proceeding held in the action pursuant to this title.

945.16. If the facts available to the parties to the CDA demonstrate that a participating PRP has no liability in the action, that PRP may be relieved of its obligation to contribute to the defense costs and upon final reallocation pursuant to Section 945.21 of the defense costs may be reimbursed for all or a portion of defense costs it previously paid.

945.17. The provisions of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure apply to the arbitration proceedings authorized by this title except to the extent they are inconsistent with the provisions of this title.

945.18. If a PRP has filed bankruptcy, has no remaining assets, and lacks any insurance coverage for its share of the defense costs governed by this title, at the time of reallocation the arbitrator shall determine, based on principles of equity, how to allocate that share.

945.19. To the extent a PRP complies with all of the terms of the CDA, and timely pays its portion of defense costs and its portion, if any, of the ultimate liability based on principles of comparative fault, any provision of a construction contract, purchase order, or similar agreement, and any insurance contract, endorsement, or similar agreement, purporting to require the PRP to pay defense costs or liability, or both, in an amount greater than its proportion of fault for the damages established in the action shall be void as against public policy and unenforceable.

945.20. Except as specifically set forth in this title, nothing in this title is intended to impair, or otherwise limit, the ability of the builder or any other party, to exercise his or her contractual, statutory, or common law rights and remedies.

945.21. Within 30 days of the conclusion of the action, the arbitrator shall reallocate, based on principles of comparative fault, all prior defense costs consistent with the final allocation of liability.

945.22. Any PRP that, on motion of any other PRP, is determined by the arbitrator to have failed to either (a) comply with all of the terms of the CDA, (b) timely pay its portion of defense costs, or (c) timely pay its portion of the ultimate liability shall not be entitled to the protections of this title.

945.23. This title does not apply to the extent that the claim is covered by a viable wrap-up insurance policy or owner-controlled insurance program. For purposes of this section, "a wrap-up insurance policy or owner-controlled insurance program" is any insurance policy that provides general liability coverage for a builder and one or more of the other PRPs.

945.24. In the event the builder contracted with a general contractor to oversee construction of the project, and the builder fails to offer a CDA in response to an action, the general contractor shall be entitled to the protections and subject to the obligations of this title.

945.25. The provisions of this title shall not be waived, affected, or impaired by contract or otherwise.

~~read:~~

~~798.25. (a) Except as provided in subdivision (d), when the management proposes an amendment to the park's rules and regulations, the management shall meet and consult with the homeowners in the park, their representatives, or both, after written notice has been given to all the homeowners in the park 10 days or more before the meeting. The notice shall set forth the proposed amendment to the park rules and regulations and shall state the date, time, and location of the meeting.~~

~~(b) Except as provided in subdivision (d), following the meeting and consultation with the homeowners, the noticed amendment to the park rules and regulations may be implemented, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent upon written notice of not less than six months, except for regulations applicable to recreational facilities, which may be amended without homeowner consent upon written notice of not less than 60 days.~~

~~(c) Written notice to a homeowner whose tenancy commences within the required period of notice of a proposed amendment to the park's rules and regulations under subdivision (b) or (d) shall constitute compliance with this section where the written notice is given before the inception of the tenancy.~~

~~(d) When the management proposes an amendment to the park's rules and regulations mandated by a change in the law, including, but not limited to, a change in a statute, ordinance, or governmental regulation, the management may implement the amendment to the park rules and regulations, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent upon written notice of not less than 60 days. For purposes of this subdivision, the management shall specify in the notice a citation to the statute, ordinance, or regulation, including the section number, which necessitates the proposed amendment to the park's rules and regulations.~~

~~(e) Any amendment to the park's rules and regulations that creates a new fee payable by the homeowner and that has not been expressly agreed upon by the homeowner and management in the written rental agreement or lease, shall be void and unenforceable.~~

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